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ABSTRACT

This discussion of the protection of privacy as it relates to archival functions draws on the procedures followed by three repositories: the Gerald R. Ford Presidential Library (NLF), the Michigan Historical Collections (MHC) at the University of Michigan, and the Walter P. Reuther Library of Labor and Urban Affairs (Reuther Library) at Wayne State University. The constitutional, common, and statutory law roots of the right to privacy concept are explored in detail, and a general overview of repository and donor restrictions is given. Discussion of the three libraries' procedures focuses primarily on their handling of labor union records, including donor restrictions, accessioning policies, screening for private information, review and appraisal procedures, third party privacy, and description procedures for closed materials. (29 references) (MAB)

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PERSONAL PRIVACY AND THE ARCHIVIST

Helmi Raaska final copy

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As one of the basic tenets of their profession, archivists believe they have a responsibility to promote free and equal access to the public records and historical documents in their custody. The tenet of open access is balanced by legal requirements and acceptance of moral responsibility to restrict access to certain types of information. One type of information requiring restrictions is that information which, if made public, would be an unwarranted invasion of an individual's privacy. These two archival responsibilities are often couched in terms of the "delicate balance" archivists must maintain between the "conflicting values of an individual's right to privacy and the public's right to know." Perhaps a better perspective would be that of William T. Bagley, California State Assemblyman, who said in a luncheon address at a seminar on privacy, "The public's "right to know" and a person's "right of privacy" are not and should not be made to appear to be conflicting rights. They are, instead, and should be made to interact as correlative responsibilities."[1]

While there is general acceptance of the principle of a right to privacy, there is a lot of room for interpretation in its application to archival materials. This paper is an attempt to discuss some of the interpretations and the practical

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1 William T. Bagley, "The Politics of Privacy," in Privacy, A Public Concern, ed. Kent S. Larsen (Washington, DC: U.S. Government Printing Office, 1975), p. 67.

implications for archivists by providing an overview of the issues relating to privacy and the legal framework under which archivists work. The discussion on the protection of privacy as it relates to archival functions will draw on the procedures followed by three repositories: the Gerald R. Ford Presidential Library (NLF), the Michigan Historical Collections (MHC) at The University of Michigan, and the Walter P. Reuther Library of Labor and Urban Affairs (Reuther Library) at Wayne State University.[2]

The concept of a right to privacy has constitutional and common law roots. A right to privacy is not explicitly guaranteed in the Constitution, but it is implied, particularly in the Fourth Amendment. It evolved as a tort, becoming part of the common law as it was defined by jurists when the invasion of someone's right of privacy was held to be a civil wrong. Up to 1890 privacy issues involved breaches of contract, trust, confidence, and property, rather than privacy itself.[3] Although 1890 is considered a turning point for the legal definition of privacy, earlier expression of privacy as a right in and of itself had

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2 The author gratefully acknowledges the time and assistance given by Michael Smith of the Walter P. Reuther Library of Labor and Urban Affairs; Marjorie Barritt, Frank Boles, and Thomas Powers of the Michigan Historical Collections; and David Horrocks of the Gerald R. Ford Library in the writing of this portion of the paper.

3 Morris L. Ernst and Alan U. Schwartz, Privacy: The Right To Be Let Alone (New York: The MacMillan Company, 1962), p. 44.

been given by Justice Thomas M. Cooley. Justice Cooley defined privacy as "the right to be let alone" in The Elements of Torts, published in 1878.[4]

Samuel Warren and Louis Brandeis expanded on the "right to be let alone" in an article published in the Harvard Law Review in 1890. Their article, "The Right to Privacy," was very influential in establishing privacy as a distinct right and was often cited in court decisions bearing on the issue. The genesis of their article was Warren's anger at the press, particularly for writing stories about his wife's elaborate entertaining. Although Warren was the initiator, it is believed that the writing and perhaps most of the research were done by Brandeis.[5] A key point in the Warren-Brandeis article was that the principle which protected personal writings and all other personal productions against publication in any form was not the principle of private property, but that of an inviolate personality.[6]

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4 Quoted in S. D. Warren and L. D. Brandeis, "The Right to Privacy," reprinted in Philosophical Dimensions of Privacy: An Anthology, ed. Ferdinand David Schoeman (Cambridge: Cambridge University Press, 1984), p. 76.
5 William L. Prosser, "Privacy," [A Legal Analysis], in Schoeman, Philosophical Dimensions of Privacy, p. 104
6 Warren and Brandeis, in Schoeman, Philosophical Dimensions of Privacy, p. 82.

Beginning with the Freedom of Information Act in 1966, the right to privacy was granted protection by statutory law as well as common law. The Warren-Brandeis article was a response to sensational journalism and new technology in photography. Federal statutes protecting privacy were a response to many factors. A primary concern was the large amount of information on private citizens held by the government, much of it required if the government were to provide the many services expected of it by these same citizens. This large volume of personal information was matched by the development of technology to maintain, access, and link information in data banks. Other factors were a growing emphasis on the public's "right to know" and new interests of historians. A growing interest in recent history, the lives of ordinary people, and people collectively as laborers, welfare recipients, women, and racial and ethnic groups, meant that historians were putting old records to new uses and wanting access to new kinds of records.

Federal statutes with provisions for the protection of privacy include the Freedom of Information Act (FOIA, S 1160 - PL 89-487), the Family Educational and Privacy Rights Act (FERPA, SJ Res 40 - PL 93-568), the Privacy Act (S 3418 - PL 93-579), and the Presidential Records Act (HR 13500 - PL 95-591). These statutes do not provide concrete answers to all questions concerning the protection of personal information in archival materials, but they do provide the context within which decisions can be made.

FOIA, enacted in 1966 and amended in 1974, 1976, and 1978, made explicit the "right to know" by stating that the records of agencies of the executive branch of government shall be open to the public and by defining the procedures by which citizens may gain access. FOIA also listed nine categories of records which may be exempted from public disclosure, and two of these categories relate to personal privacy. Exemption 6 states that an agency may keep closed or restrict access to personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.[7] The seventh exemption covers investigatory records compiled for law enforcement purposes, and states that under certain conditions records may be withheld. Two of these conditions are if disclosure of the records would constitute an unwarranted invasion of personal privacy and if it would disclose the identity of a confidential source.[8] The interpretation of the sixth exemption by the US Supreme Court is that any information could be withheld to protect an individual from "the injury and embarrassment that can result from the unnecessary disclosure of personal information."[9]

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7 Trudy Huskamp Peterson, "Federal Records, Privacy and Public Officials in the United States," in Access to Archives and Privacy: Proceedings of the Twenty-Third International Archival Round Table Conference (Paris: International Council on Archives, 1987), p. 136.
8 Ibid.
9 Ibid.

Presidential materials prior to those of the Reagan administration are not subject to FOIA, Each president had considered the White House files from his administration to be his personal property, and he or his heirs disposed of them as they saw fit. Franklin Roosevelt made provisions for the establishment of the first presidential library to be administered by the National Archives and for the donation of his papers to the government. Herbert Hoover and the presidents succeeding Roosevelt followed this example. The presidential papers in these libraries are donated historical materials governed by instruments of gift. In the aftermath of Watergate the Presidential Recordings and Materials Preservation Act was passed in 1974 to allow the government to gain possession and control of the Nixon papers and tapes. The Presidential Records Act of 1978, described in more detail on page 8, became effective on January 20, 1981. This Act ended the personal property tradition and prescribed how FOIA would be applied in certain circumstances to presidential materials.[10]

Two pieces of legislation enacted in 1974, the Privacy Act and FERPA, had further impact on personally identifiable records,

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10 For an overview of legislation relating to presidential libraries see Frank L. Schick, with Renee Schick and Mark Carroll, Records of the Presidency: Presidential Papers and Libraries from Washington to Reagan (Phoenix: Oryx Press, 1989), pp. 13-19. See also Raymond Geselbracht, "The Four Eras in the History of Presidential Papers," Prologue 14 (1983): 37-42.

although this time in terms of a person's access to records about himself. The Privacy Act applies to records of agencies in the executive branch and addresses the issues of an individual's access to records directly related to himself and the sharing of information among agencies. In the language of the Act, "the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use and dissemination of information by such agencies."[11] The basic points of the law are: there must be no secret personal data record-keeping operations, an individual has the right to find out what information there is about him in a record and how it is used, an individual has the right to correct or amend information about himself, information obtained for one purpose cannot be made available for other purposes without the consent of the individual, and the agency creating the record must assume responsibility for assuring the reliability of the data for the intended use and must take reasonable precautions to prevent misuse of the data. Agencies are subject to civil suit for any damages resulting from willful or intentional action which violates an individual's rights under the Act.

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11 Privacy Act of 1974, PL 93-579, Section 2 (a) (4) and (5).

The statute with the broadest effect is FERPA, also known as the Buckley Amendment. FERPA legislation applies to all schools receiving federal funds and regulates the keeping of student records by giving an individual the right to inspect and challenge the information in his record and prohibiting the release of records without consent, except under limited circumstances and under specified conditions. The protection of records under FERPA continues for the assumed life of the student.

The most recent federal statute with provisions for the protection of privacy is the Presidential Records Act of 1978. This legislation was first applied to the materials of the Reagan administration. The law defines which of the materials of the president and vice-president are public records and which are personal papers. Individual officeholders will control access to their papers, but access to the records is governed by law. Personal information in the records is protected by provisions with language similar to the FOIA exemptions.[12]

Personal privacy in donated presidential papers had been protected by language in the instrument of gift stating that

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12 Peterson, "Federal Records, Privacy and Public Officials," p. 137.

materials containing information which could be used to embarrass, damage, injure, or harass a living person should be restricted. These four phrases, or the varying combinations of them used by donors, called for subjective interpretation by archivists when reviewing presidential materials. In the wake of Watergate these phrases gave way to other language. President Ford's deed of gift, executed after Watergate but before the Presidential Records Act, restricts "Materials containing information or statements that might be used to harass or injure any living person or to interfere with a person's right to privacy or right of association." New language stating that information should be restricted if disclosure would constitute a "clearly unwarranted invasion of personal privacy" conforms to FOIA language. This legacy of Watergate has liberalized the review criteria used by archivists at presidential libraries. The fact that someone may be embarrassed by release of information is no longer sufficient reason for restricting it; the crucial question is whether or not disclosure of the information would constitute a clearly unwarranted invasion of personal privacy.[13]

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13 For discussion of review at presidential libraries see William J. Stewart, "Opening Closed Material in the Roosevelt Library," Prologue 7 (1975): 239-41. See also Daniel J. Reed, "A Matter of Time," in Access to the Papers of Recent Public Figures: The New Harmony Conference, ed. Alonzo L. Hamby and Edward Weldon (Bloomington: Organization of American Historians, 1977), pp. 64-71, and Barton J. Bernstein, "A Plea for Opening the Door," in Access to the Papers of Recent Public Figures, pp. 83-90.

This brief overview of federal legislation is enough to make one aware of the many limitations of the statutes. Although personal privacy is a right which requires protection, there is no statute which universally protects personal information in all public records and personal papers in all repositories. Both FOIA and the Privacy Act apply only to records in the executive branch of government, and only to the official records of an agency. An agency official may generate and maintain files in the course of carrying out his official duties which are considered personal papers rather than official records. The language of FOIA itself does not state which files are public records and which are personal papers; agency officials make the distinction themselves based on criteria established through litigation over the Act.[14] Should an agency official ever place his personal papers in an archival repository, he would control access to them through the deed of gift or deposit.

FOIA applies to records whether they are in the agency's custody, in a Federal Records Center operated by the National Archives, or if they have been accessioned into the National Archives as permanently valuable records.[15] With the enactment

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14 Peterson, "Federal Records, Privacy and Public Officials," p. 138.
15 James E. O'Neill, "Federal Law and Access to Federal Records," in Access to the Papers of Recent Public Figures, p. 39.

of the 1974 amendments, the National Archives, rather than the originating agency, was given the responsibility of making determinations regarding the release of records which are their physical and legal property.[16] The Privacy Act applies to records still in the custody of agencies; the National Archives received a virtual exemption from the Act for records accessioned by them.[17]

The problem of personal papers/official records was addressed by the Twenty-Third International Archival Round Table Conference on Access to Archives and Privacy. One of the recommendations to come out of the conference was to call "the attention of archival authorities to the fact that the protection of privacy requires that the so-called private papers of public officials containing sensitive information on individuals should be subject to the same access rules as public records."[18]

FOIA is further limited in that the language of the legislation states that information in the privacy exemptions may be withheld, not that it must be withheld.[19] Another limitation is that FOIA does not apply to presidential materials prior to the

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16 O'Neill, "Federal Law and Access to Federal Records," p. 40.
17 Ibid.
18 "Recommendations," Access to Archives and Privacy, p. 174.
19 Peterson, "Federal Records, Privacy and Public Officials," p. 136.

term of office beginning in 1981. The Presidential Records Act allows FOIA to be applied in certain circumstances to presidential records beginning with that term.[20]

The records of the legislative and judicial branches of government are not covered by federal statutes protecting privacy. The records of Congress and the courts as entities are considered the official records. By tradition, the papers created by individual legislators and judges are considered personal papers with the individual controlling access.

Federal legislation is only the first layer of legal requirements archivists need to be aware of. The individual states also have open records laws. These laws vary from state to state, with some closely parallel to FOIA. Many states also have general privacy protection laws in addition to specific statutes governing access to particular groups of records such as hospital and adoption records. It is beyond the scope of this paper to discuss state laws, but archivists need to be aware of those which apply to materials in their repository.

Policies established by the larger institution of which the archives is a part may also impact on access to materials. Presidential libraries and university archives are good examples

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20 Ibid.

of the hierarchies in which repositories often function. Presidential libraries are governed by policies established by the Office of Presidential Libraries, which in turn is governed by NARA policies. University archives are governed by regulations established by the central administration and board of regents.

Repositories may also establish general policies regarding access to materials and the protection of privacy. The ALA-SAA joint statement on access to original research materials acknowledges this responsibility in Section 7. The section includes the statement, "...At the same time, it is recognized that every repository has certain obligations to guard against unwarranted invasion of personal privacy and to protect confidentiality in its holdings in accordance with the law and that every private donor has the right to impose reasonable restrictions upon his papers to protect privacy or confidentiality for a reasonable period of time."[21]

The final layer of access restrictions is that which may be imposed by an individual donor in a deed of gift or deposit. As quoted above, the ALA-SAA joint statement acknowledges that a private donor has the right to impose restrictions. Section 7

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21 American Library Association-Society of American Archivists, Joint Statement on Access to Original Research Materials in Libraries, Archives, and Manuscript Repositories," 1979.

follows this with a subsection (b): "The repository should discourage donors from imposing unreasonable restrictions and should encourage a specific time limitation on such restrictions as are imposed."[22]

It is in these last two layers, repository and donor restrictions, that we are concerned with protecting personal privacy in the records of private institutions and the papers of individuals and families. There are no specific statutory laws relating to these materials, however, access should certainly be influenced by common law principles. Another recommendation of the Twenty-Third International Archival Round Table was, "private archives in custody of archival institutions should be accessible under conditions which are clear, non-discriminatory, limited in time, and consistent with the policy governing access to comparable information in public archives."[23]

The preceding paragraphs emphasize the right to privacy and the need to impose access restrictions. Sue Holbert, in Archives & Manuscripts: Reference & Access, reminds us that the right to information is as valid as the right to privacy. Holbert warns, "repositories should resist unnecessary donor-imposed restrictions and should not themselves limit use lightly or

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22 Ibid.
23 "Recommendations," Access to Archives and Privacy, p. 174.

capriciously. Although few cases have arisen in which a potential user has sued for right of access to nonpublic records, it appears that the burden of justifying a denial of access would fall on the repository."[24] The point is well taken, but one could argue that an error in denying access would be easier to remedy than one in granting access injudiciously.

Just as there is room for interpretation in the application of privacy statutes, so there is room for interpretation in some of the basic definitions relating to privacy. To go beyond the definition of privacy as "the right to be let alone," one could consider the definition given by Sissela Bok in Secrets. Bok defines privacy as "the condition of being protected from unwarranted access by others - either physical access, personal information, or attention. Claims to privacy are claims to control access to what one takes - however grandiosely - to be one's personal domain."[25] This definition acknowledges that people will have different ideas about what constitutes their personal domain.

Other terms which can be defined in degrees are "unwarranted invasion of privacy" and "unduly invasive." How does one

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24 Sue E. Holbert, Archives & Manuscripts: Reference & Access (Chicago: Society of American Archivists, 1977), p. 6.
25 Sissela Bok, Secrets: On the Ethics of Concealment and Revelation (New York: Pantheon Books, 1983), p. 11.

determine what constitutes an unwarranted invasion of privacy? On the basis of the Warren-Brandeis principle of an "inviolate personality" one could say that all invasion of privacy is unwarranted. Another point of view is expressed by Bok, who discusses the meaning of "unduly invasive" in her book. Her discussion relates to gossip, but perhaps the basic points can also be applied to archival materials. Bok believes that just because one claims that gossip about oneself is unduly invasive does not make it so.[26] To make gossip unduly invasive, certain factors must be present: the information must be about matters legitimately considered private, and it must hurt the individual talked about, as for example, to cause a person to lose his job.[27] The legal requirements for an invasion of privacy suit differ on this last point. According to William Prosser, there is general agreement that the plaintiff need not plead or prove special damages.[28]

Legally, there are four different forms of invasion of privacy: (1) intrusion upon the individual's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the individual; (3) publicity that places the individual in a false light in the public eye; and (4)

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26 Bok, Secrets, p. 97.
27 Ibid.
28 Prosser, "Privacy," p. 118.

appropriation, for another person's advantage, of the individual's name or likeness.[29] Prosser explains that intrusion and disclosure require invasion of privacy, disclosure and false light depend on publicity, and appropriation usually involves publicity.[30] The important point about disclosure is publicity; there must be a public disclosure of private facts.[31] Prosser also states that "the matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities."[32]

Invasion of privacy and libel, although similar, are different in that truth is a defense in libel. A true statement about a person cannot be libelous; in invasion of privacy the damage is in the information being made public, whether or not it is true.[33]

Among the generally accepted premises relating to privacy are: (1) it is a right of the living, (2) the need for protection of information diminishes over time, (3) once information is public it remains public, and (4) public figures give up some of their

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29 Gary M. Peterson and Trudy Huskamp Peterson, Archives & Manuscripts: Law (Chicago: Society of American Archivists, 1985), p. 40.
30 Prosser, "Privacy," p. 117.
31 Prosser, "Privacy," p. 110.
32 Prosser, "Privacy," p. 111.
33 Peterson and Peterson, Archives & Manuscripts, p. 40.

right to privacy. As in the other areas relating to privacy, there is a degree of variation in the interpretation of these premises.

Regina McGranery takes strong exception to the premise that privacy is a right of the living. Speaking from a donor's perspective, she says, "I reject the notion implicit in the standard donor contract forms, that time erodes the right of privacy. There is a presumption in these contracts that the passage of time eliminates the need for restrictions. This view fails to recognize that a person's interest in his good name does not die with him. On the contrary, along with his name it is passed on to his descendants. The provision I find most short-sighted is that which protects only living persons from the publication of papers which might be used to embarrass, damage, injure or harass them. After all, the living can respond but the dead are forever silent. A person's reputation after his death could easily be destroyed by publication of materials which only he, if alive, could disprove."[34] McGranery's argument raises the question of whether a deceased person's reputation should be protected if that reputation is a false one. One could argue that there are times when the public interest is served by removal of restrictions, as when the

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34 Regina C. McGranery, "A Donor's View," in Access to the Papers of Recent Public Figures, p. 55.

information being protected concerns the discharge of duties by an elected or appointed public official.

Prosser points out that there is no common law right of action for a publication concerning a deceased person, but the laws of Oklahoma, Utah, and Virginia expressly provide for such an action.[35] (The book I am citing was published in 1984; state laws may have been changed since then).

A deceased person may no longer be injured by the release of private information, but his heirs may be. In cases such as this, the rights of the living are protected, even if the information is about a dead person. Archivists at the MHC and Reuther Library extend restrictions beyond the life of an individual to protect surviving family members. The model deed of gift in the Office of Presidential Libraries handbook specifies living individuals in the standard privacy clause, and on this basis surviving family members are protected. Similar practices were discussed at the Twenty-Third International Archival Round Table Conference. According to the representative from Australia, "If the information is likely to be distressing to a family, then the information regarding a deceased person is protected also."[36] In the words of the

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35 Prosser, "Privacy," p. 118.
36 "Third Working Session," Access to Archives and Privacy, p. 159.

representative from France, "descendants should not be made to pay for the errors of their parents."[37]

Restricting information about a dead person to protect living family members appears to be a common practice, but for how many generations should this be done? Is there a point at which descendants would no longer be injured by release of information about their ancestors?

The second premise is that the need for protection of privacy diminishes over time, but this period of time is often defined only as "reasonable." Some types of information are protected by laws which are very specific about the passage of time, as the law which states that schedules and questionnaires from the 1920 and subsequent censuses are confidential for seventy-two years. FERPA regulations protect information for the assumed life of the student, and staff at the MHC have been given guidance that this is eighty years from the creation of the record. When there are no guidelines beyond "reasonable" archivists and donors need to determine what reasonable is. Staff at NLF, MHC, and the Reuther Library deal with this issue on an individual basis with donors when negotiating the deed of gift or deposit. If a donor wishes to impose restrictions, the repository will encourage him to also set a time limit on them

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37 Ibid., p. 160.

or specify a condition upon which the materials may be opened. The ultimate goal of these repositories is to open all of their materials; closing materials is viewed as a temporary measure to meet a temporary need.

The Reuther Library has a standard policy to keep all records of ongoing organizations closed for ten years. A policy such as this can meet short-term needs to close materials without adding an administrative burden to the archival staff. MHC does not have a similar ten year policy, but staff made it clear that they do apply a different stan?vacy to older materials than they do to current ones. NLF does not have a ten year policy either, but neither does it collect the records of ongoing organizations on the same scale as the Reuther Library and MHC do.

The third premise is that once information is public information it usually remains so. This is a factor in invasion of privacy lawsuits, but Prosser says that while the existence of a public record is of importance, under some circumstances it is not necessarily conclusive.[38] The existence of a public record is one of the factors considered by archivists at the three repositories under consideration when deciding whether or not to

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38 Prosser, "Privacy," p. 111.

close information. Existence of a public record usually means that the information has appeared in published form.

Another viewpoint was expressed at the Round Table. One of the representatives stated that, "alongside the right to know, there is the right to forget, which is recognised in the laws of several countries, including France."[39] He gave as an example the fact that convictions which have been subject of an amnesty can no longer be cited publicly.[40] Courts in the United States seal or expunge records in certain circumstances, so there is a "right to forget" in this country also. The unanswered question is, should this principle be a factor in making decisions about opening archival materials?

To consider the fourth premise we need to define who a public figure is. Prosser defines a public figure as "one who by his own voluntary efforts has succeeded in placing himself in the public eye."[41] He claims that such public figures lose some of their right to privacy for three reasons: "(1) they have sought publicity and consented to it, (2) their personalities and affairs have already become public and can no longer be regarded private, and (3) the press has the privilege, guaranteed by the

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39 "Third Working Session," Access to Archives and Privacy, p. 157.
40 Ibid.
41 Prosser, "Privacy," p. 119.

Constitution, to inform the public about those who have become legitimate matters of public interest."[42] A key point in Prosser's definition is the word "voluntary." Michael Mayer points out that people do not always achieve public figure status voluntarily - sometimes this happens entirely against their will.[43] If we recognize a difference between public figures and private individuals, do we also recognize a difference between voluntary and involuntary public figures? Bok, for one, believes that children of those who have sought public attention often have a stronger claim to privacy than their parents do.[44]

The definition given for a public figure is not limited to politicians, public administrators, and statesmen, but includes all who are in the public eye. Among those who are public figures are public officials who hold elective or appointive public office. One of the criteria for public officials is that the public has a right to know about anything bearing on their ability to discharge their duties. While this appears to be a reasonable standard, it is clear that there is no well-defined demarcation line, particularly in terms of the mass media. Public sensibilities have been changing over time, and what had

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42 Ibid.
43 Michael F. Mayer, Rights of Privacy (New York: Law-Arts Publishers, Inc., 1972), p. 193.
44 Bok, Secrets, p. 253.

been considered private in the past is often considered relevant and public now. The demarcation line is even less clear for those public figures who do not hold or seek public office.

Public figures do have a smaller sphere of privacy, but they do not give up all rights to privacy. The problem lies in determining what is a legitimate matter of public interest and what is strictly a private matter.

In addition to negotiating terms of access in deeds of gift, which has already been discussed, archivists at NLF, MHC, and the Reuther Library follow other procedures to protect personal privacy. The three repositories have different practices, but all with the same goal. The differences in procedures reflect the institutional differences of the repositories and the differences in their collections. NLF is part of the National Archives and as such is a public institution. The holdings reflect the activities of individuals at the highest levels of government. MHC collects the papers of individuals and the records of organizations, and as part of The University of Michigan, has a developing university records program. The Reuther Library is not a public institution; the Library can deny access to anyone, even to open materials. For purposes of this paper, discussion of their procedures focuses primarily on their handling of labor union records. Staff at the Reuther Library stated that labor unions are very open about their

records, but they do show concern for the protection of personal privacy.

In addition to the legal requirements for protecting privacy, archivists at all three repositories consider donor relations a very important reason for being careful with sensitive information. At NLF this is a concern more in terms of the intense national spotlight members of the Ford administration have been or may continue to be in. For MHC and the Reuther Library, this is right at the heart of their abili?ct. Archivists at both repositories said if their reputations were damaged because of indiscrete handling of certain kinds of information, it would adversely affect their collecting programs.

The protection of privacy begins with accessioning at all three repositories, and staff at the Reuther Library indicated they would carry this to the point of not accepting materials that would invade an individual's privacy. They noted specifically that they do not accept oral histories that are clearly libelous or unduly invasive of privacy.

The MHC has developed specific policies for accessioning university records. Access to university records is bound by federal and state laws, regental guidelines, and regulations in the university's standard practices guide. Various regulations apply to records such as student,

patient, personnel, and financial records. These types of records are not accessioned, partly because of privacy issues, and partly because of their minimal historical value, or because other university units have been given responsibility for their keeping. Other records with privacy concerns, such as search and tenure files, are accessioned and reviewed on a case-by-case basis.

Staff at NLF survey each collection during accessioning and make note of any materials that might require access restrictions. This information is included in the accession record and becomes part of the accession case file.

At the MHC and the Reuther Library screening for private information is implemented during arrangement. Before arrangement is started, the supervisor will discuss the collection with the processor and alert him/her to the types of sensitive information that might be found in the materials. The Reuther Library processing manual gives as examples of material of a very personal nature medical or legal case records, personnel records including performance evaluations, intimate diary passages, love letters, and interviews or any documents which contain statements which may be libelous. Similar guidelines are followed at the MHC, with emphasis being given to personnel, medical, legal, and financial information concerning individuals, and information given or collected in a client relationship. The screening is not an item-level review, but if

sensitive information is found the processor will look more closely at the rest of the collection. After the processor has identified the materials in the collection which may need to be closed, he/she will discuss them with supervisor. Other members on the staff may also be consulted, especially one with a particular expertise or the field representative involved in getting the collection to the archives. On the basis of these consultations, a decision is made as to whether or not a particular item should be closed.

At the MHC the consultation includes an appraisal of the item. Archivists may determine that the item does not add to the collection and the best option is to return it to the donor or seek the donor's permission to dispose of it. Staff at the MHC pointed out that donors are not always aware of what is in a collection. They may be heirs who never really knew everything in the collection in the first place, or the papers were packed away for so long that they forgot what was there. Often when staff contact a donor to discuss sensitive items, the donor will ask to have them returned. If a donor does not request the return of these items or the closure of sensitive information, the MHC will take it upon itself to close information if that action is warranted.

A recurring warning in the literature is that materials should not be appraised on the basis of privacy concerns alone. The danger is that historically valuable information will be lost

because an institution may wish to avoid the burdens imposed by the need to protect privacy. While privacy is a factor in making appraisal decisions at the MHC, the primary factor is the historical significance of the information; materials are not weeded out of collections strictly on the basis of privacy concerns.

At NLF review is a separate process, usually done on a page-by-page basis, and in the tradition established for presidential libraries by the Franklin Roosevelt Library. Because President Ford's materials are not covered by the Presidential Records Act of 1978, review of the presidential papers is done in accordance with the terms of his deed of gift. Other collections are reviewed on the basis of the deeds of gift governing access to them. Archivists at NLF do make individual decisions to close items, but consultation with colleagues is common in situations where there is not an obvious answer.

One of the problems I was especially interested in was the review of congressional collections and university records to protect third party privacy. NLF and the MHC provide a setting in which to look at this issue, but before considering review, one must consider appraisal.

When appraising casework or constituent files, one needs to take into account their bulk, their historical significance, and the privacy of letter writers. Patricia Aronsson writes

that casework files have anecdotal value but minimal historical significance, and recommends that these files be scheduled for periodic destruction. Aronsson does give exceptions to this recommendation: if the casework files are unique to a geographic region, as black lung disease and West Virginia, or if the individual senator or representative was particularly interested in the issue which generated the mail.[45] Although the general recommendation is to schedule constituent case files for periodic destruction, some of these files will be opened for research. What steps are taken to protect personal privacy when this happens?

The MHC does heavy appraisal of the constituent files in their congressional and state legislator collections. If something survives the appraisal process, then it is generally open. Constituent files from Mr. Ford's Congressional Papers have not undergone such an appraisal, but NLF staff carefully review them before they are made available to researchers. During the review process items which contain information considered invasive of an individual's privacy are withdrawn. Similar materials can be found in the Ford Presidential Papers, especially files of the Congressional Relations Office staff. Senators and representatives often wrote to someone in this

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45 Patricia Aronsson, "Appraisal of Twentieth-Century Congressional Collections," in Archival Choices, ed. Nancy E. Peace (Lexington: D.C. Heath and Company, 1984), p. 93.

office on behalf of a constituent, and would often enclose a copy of the correspondence from the constituent. Any correspondence containing personal information the release of which would be an invasion of privacy has been withdrawn to protect the individual.

Third party privacy is also an issue in certain university records, and this is a concern staff at the MHC deal with regularly. Two good examples are faculty meeting minutes and search committee reports, which have historical value because they define the department's academic objectives and what is considered professional competence. Individual students and faculty members are often the subject of discussion in these documents, and this presents a question about the protection of privacy. Frank Boles and Julia Young give the example of minutes of faculty meetings in the records of the UM Medical School. These minutes contained candid discussions of faculty and other medical educators, and in order to protect the privacy rights of third parties, they were closed for twenty years from date of creation.[46] A concern here, and in many similar cases, is to protect the privacy of individuals during their active careers.

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46 Frank Boles and Julia Marks Young, "Exploring the Black Box: The Appraisal of University Administrative Records," The American Archivist 48 (1985): 136.

Description is an important archival activity, and the three repositories all have different ways of describing materials that have been restricted to protect privacy. At the Reuther Library a list is made of all items closed to research, but this list is kept in the case file and is not part of the finding aid. As items are opened, they are added to the finding aid. At the MHC closed materials are not described at the item level, but folder titles are listed on the inventory with an indication that an item or entire folder is closed. A tickler file is kept so that there will be regular rereview of closed items. NLF has the most elaborate procedures for description of closed materials. Closed materials are identified to the item level on withdrawal sheets, one of which is placed in the front of the folder from which the items were withdrawn. A copy of the withdrawal form is placed with the closed items in a parallel file.

The responsibility to protect personal privacy in archival materials should be taken seriously by every archivist. It may appear to be an overwhelming task, both because of all of the regulations in some instances, and the absence of laws in others. We are not and cannot hope to be legal experts with the ability to interpret the law and to have right answers for every situation, but there are steps we can take to prepare ourselves to do the best job possible. The first step is to know the materials in our custody and what laws govern access to them. We should be familiar with statutory and common law, but also

realize that there may be times when we will need expert advice. We also need to have a written policy statement at the individual repository level regarding personal privacy and the procedures to be followed to ensure its protection. An archivist need not function in a vacuum; there is a wealth of professional literature to inform us on this subject. In terms of our treatment of both materials and researchers, we must be fair and nondiscriminatory. The best defense, if one should ever be needed, is to show that standard procedures were followed and that no collection or researcher was treated differently from another.

BIBLIOGRAPHY

American Enterprise Institute. Privacy Protection Proposals. Washington, DC: American Enterprise Institute, 1979.

American Library Association-Society of American Archivists. Joint Statement on Access to Original Research Materials in Libraries, Archives, and Manuscript Repositories. 1979.

Aronsson, Patricia. "Appraisal of Twentieth-Century Congressional Collections." In Archival Choices, edited by Nancy E. Peace. Lexington: D.C. Heath and Company, 1984.

Baumann, Roland M. "The Administration of Access to Confidential Records in State Archives: Common Practices and the Need for a Model Law." The American Archivist 49:349-69.

Bok, Sissela. Secrets: On the Ethics of Concealment and Revelation. New York: Pantheon Books, 1983.

Boles, Frank, and Young, Julia Marks. "Exploring the Black Box: The Appraisal of University Administrative Records." The American Archivist 48:121-40.

Breckenridge, Adam Carlyle. The Right to Privacy. Lincoln: University of Nebraska Press, 1970.

Buchen, Philip W. "Secrets of History and the Law of Secrets." The American Archivist 40:51-5.

Ernst, Morris L., and Schwartz, Alan U. Privacy: The Right To Be Let Alone. New York: The MacMillan Company, 1962.

Flaherty, David H. "Privacy and Confidentiality: The Responsibilities of Historians." Reviews in American History 8:419-29.

Geselbracht, Raymond H. "The Four Eras in the History of Presidential Papers." Prologue 15:37-42.

Geselbracht, Raymond H. "The Origins of Restrictions on Access to Personal Papers at the Library of Congress and the National Archives." The American Archivist 49:142-62.

Hamby, Alonzo L., and Weldon, Edward, ed. Access to the Papers of Recent Public Figures: The New Harmony Conference. Bloomington: Organization of American Historians, 1977.

Hoff-Wilson, Joan. "Access to Restricted Collections: The Responsibility of Professional Historical Organizations." The American Archivist 46:441-47.

Holbert, Sue E. Archives & Manuscripts: Reference & Access. Basic Manual Series. Chicago: Society of American Archivists, 1977.

International Archival Round Table Conference. Access to Archives and Privacy. Proceedings of the Twenty-Third International Archival Round Table Conference. Paris: International Council on Archives, 1987.

Larsen, Kent S., ed. Privacy, A Public Concern. Washington, DC: U.S. Government Printing Office, 1975.

Mayer, Michael F. Rights of Privacy. New York: Law-Arts Publishers, Inc., 1972.

Peterson, Gary M., and Peterson, Trudy Huskamp. Archives & Manuscripts: Law. Basic Manual Series. Chicago: Society of American Archivists, 1985.

Privacy Act of 1974. PL 93-579. Title 5 of the United States Code.

Privacy Protection Study Commission. Personal Privacy in an Information Society. Washington, DC: U.S. Government Printing Office, 1977.

Reitman, Alan. "Freedom of Information and Privacy: The Civil Libertarian's Dilemma." The American Archivist 38:501-08.

Robbin, Alice. "State Archives and Issues of Personal Privacy: Policies and Practices." The American Archivist 49:163-75.

Robertson, A. H., ed. Privacy and Human Rights. Manchester: University Press, 1973.

Rundell, Walter, Jr., and Adams, Bruce F. "Historians, Archivists, and the Privacy Issue." Reprint from Georgia Archive 3 (Winter 1975).

Schick, Frank L., with Schick, Renee, and Carroll, Mark. Records of the Presidency: Presidential Papers and Libraries from Washington to Reagan. Phoenix: Oryx Press, 1989.

Schoeman, Ferdinand David, ed. Philosophical Dimensions of Privacy: An Anthology. Cambridge: Cambridge University Press, 1984.

Shank, Russell. "History, Legal, Social and Ethical Aspects and Privacy: Its Role in Federal Government Information Policy." Library Trends 35:7-18.

Stewart, William J. "Opening Closed Material in the Roosevelt Library." Prologue 7:239-41.